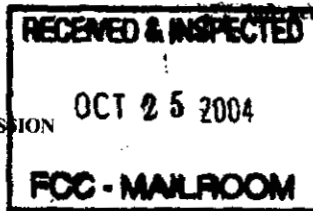


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October 19, 2004

Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals II
445 12th Street, SW
Washington, DC 20554

RE: Reply Comments of the New York State Department of Public Service in the
Matter of Unbundled Access to Network Elements, WC Docket No. 04-313;
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange
Carriers, CC Docket No. 01-338.

Dear Secretary Dortch:

On August 20, 2004, the Federal Communications Commission (Commission) issued an Order and Notice of Proposed Rulemaking (NPRM)¹ in the above-captioned proceeding seeking comments on establishing unbundling rules under the Telecommunications Act of 1996 (the Act) 47 U.S.C. 251(c) and 251(d)(2) in a manner consistent with the *USTA II* decision.² By this letter, the New York State Department of Public Service (NYDPS) submits its reply comments in this proceeding.

The NYDPS filed initial comments in response to the NPRM on October 4, 2004. In those comments we urged the Commission to establish unbundling rules that promote and encourage facilities-based competition. Toward that end we proposed a method for evaluating switching impairment by evaluating the presence of both intramodal and intermodal competition. In these reply comments we oppose parties who see no role for the states under §271 of the Act.

¹ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of ILECs*, Order and NPRM, FCC-04-179.

² *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

Ms. J. G. Ryan rec'd
List / BQHE

New York has a long-established statewide policy of enabling competitive telecommunications markets as a means of ensuring economic development, rational investment, technological advancement, and consumer choice. In large measure, that policy depends on ensuring that the terms and conditions under which competing carriers interact (i.e., wholesale transactions) remain reasonable as market conditions across the state evolve. New York's ability to pursue that policy on a coherent statewide basis could be frustrated by a regulatory structure that assumes the Commission has plenary authority over such transactions if they are no longer required by §251 of the Act.

Such a regulatory framework could lead to a patchwork of inconsistent wholesale rates, terms and conditions across the state, as the state's policy would apply in some places for some wholesale items, while for other items and/or in other places potentially inconsistent federal policy would prevail.³ That this patchwork would continue to be re-sewn as additional items or markets are removed from the §251 ambit would only further compound this confusion. It is questionable whether competitors could continue to operate effectively in such an environment. Alternatively, the state might feel compelled to mirror the federal policy simply to maintain a consistency, even though the federal policy might not be ideal given the state's particular market conditions. In all likelihood, federal policies will tend toward national uniformity, leading to suboptimal results for many localities. There is no reason to assume that what is best for Manhattan, Kansas is also best for Manhattan, New York. Each state should retain the ability to pursue coherent statewide policies that are consistent with the Act's pro-competitive, deregulatory purpose and with conditions in their own particular markets.

A patchwork regulatory framework for wholesale items also would negatively affect the state's ability to pursue important state telecommunications policies on the retail side. Clearly, retail rates and rate structures are strongly influenced by the corresponding wholesale rates and rate structures. The state's retail price regulation would become increasingly less effective as the wholesale rates, which determine the price floor and influence the rate structure, increasingly would be controlled by federal determinations. Likewise, the state's ability to establish consistent statewide policies for telecommunications security, network reliability, and service quality also would be reduced.

Moreover, we oppose the ILECs' contention that the states have no authority under federal and state law to regulate §271 items.⁴ The Commission should also reject Bell South's arguments in its July 2004 Emergency State Preemption Petition relied upon in its comments in this proceeding.⁵ Instead, the arguments raised by AT&T Corp. and ACN Communications

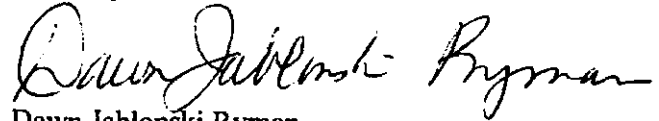
³ For example, a state might have established a service order process metric that calls for the provisioning of wholesale local switching arrangements within three days of a firm order. At a minimum, this standard would apply in markets where unbundled local switching is required under §251. The Commission, however, might establish a more liberal standard (e.g., seven days) to be applied where unbundled local switching is provided merely to comply with §271. Which of these two standards would apply on any given order could depend on the nature of the customer (mass market or enterprise) as well as the geographic location of the wire center serving the customer.

⁴ See Verizon Comments at pp. 120-128; United States Telecom Association at pp. 24-25; Bell South at pp. 70-81.

⁵ *Bell South Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245 (filed July 1, 2004). Bell South Comments at pp. 78-80.

Services, Inc.⁶ in this proceeding, and the comments of the Tennessee Regulatory Authority (TRA) to Bell South's Emergency Petition should serve as the basis for the Commission to reject the preemption claims.⁷ In sum, there is no justification for eliminating the state role under §271.

Sincerely,



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⁶ See AT&T Comments at pp. 175-182; ACN Communications Exhibit 4.

⁷ See TRA Comments at Exhibit 5 – Opposition of the TRA to Bell South's Emergency Petition, and Exhibit 7 – Reply of the TRA in Opposition to Bell South's Emergency Petition; *See also*, Comments filed *In the Matter of Bell South Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245, by the National Association of Regulatory Utility Commissioners, the New Jersey Ratepayer Advocate, Covad Communications, Z-Tel Communications, and Pace Coalition, Competitive Carriers of the South, Talk America, and Comptel/Ascent.